92-350

No.

Supreme Court, U.S.
FILED
AUG 26 1992
OFFICE OF THE CLERK

IN THE SUPREME COURT
OF THE UNITED STATES

October Term 1991

Frances LANCASTER; Larry LANCASTER,

Petitioners,

v.

MERCHANTS NATIONAL BANK
OF FORT SMITH, ARKANSAS

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Orin Christopher Meyers
O. Christopher Meyers, Inc.
15 Northwest 44th Street
Post Office Box 1087
Lawton, Oklahoma 73502
(405) 355-0341

Counsel for Petitioner

QUESTIONS PRESENTED FOR REVIEW

1. Does the decision of the federal appellate court below present a plain conflict with the prior decisions of the Arkansas Supreme Court in holding that a trust, which specifically authorizes the trustees to distribute the entire principal of the trust to "one or more individuals or entities with financial needs that are not being adequately provided for otherwise," at any time, without regard to any charitable object, constitutes a valid charitable trust under Arkansas law?

2. Does the decision of the federal appellate court below present a plain conflict with the prior decisions of this Court and the Arkansas Supreme Court, in holding that a trust which specifically authorizes the trustees to distribute the entire principal of the trust to "one or

more individuals or entities with financial needs that are not being adequately provided for otherwise," at any time, without regard to any charitable object, constitutes a valid charitable trust under the Statute of Charitable Uses, 43 Eliz. c.4, 1601, as incorporated into the laws of the State of Arkansas by Ark. Code Ann. § 1-2-119 (1987)?

TABLE OF CONTENTS

	Page
Questions Presented for Review . . .	i
Table of Authorities	v
Opinions Below	1
Jurisdiction	2
Statutory Provisions Involved . . .	4
Statement of the Case	7
Reasons For Granting The Writ . . .	13
I. THE DECISION OF THE FEDERAL APPELLATE COURT BELOW PRESENTS A PLAIN CONFLICT WITH THE PRIOR DECISIONS OF THE ARKANSAS SUPREME COURT IN HOLDING THAT A TRUST, WHICH SPECIFICALLY AUTHORIZES THE TRUSTEES TO DISTRIBUTE THE ENTIRE PRINCIPAL OF THE TRUST TO "ONE OR MORE INDIVIDUALS OR ENTITIES WITH FINANCIAL NEEDS THAT ARE NOT BEING ADEQUATELY PROVIDED FOR OTHERWISE," AT ANY TIME, WITHOUT REGARD TO ANY CHARITABLE OBJECT, CONSTITUTES A VALID CHARITABLE TRUST UNDER ARKANSAS LAW	13
a. Summary	13

TABLE OF CONTENTS (CONT'D)

			Page
I.	b.	Discussion of Arkansas Authority	18
	c.	Discussion of Other Authority Regarding Charitable Trusts	24
II.		THE DECISION OF THE FEDERAL APPELLATE COURT BELOW PRESENTS A PLAIN CONFLICT WITH THE PRIOR DECISIONS OF THIS COURT AND THE ARKANSAS SUPREME COURT, IN HOLDING THAT A TRUST WHICH SPECIFICALLY AUTHORIZES THE TRUSTEES TO DISTRIBUTE THE ENTIRE PRINCIPAL OF THE TRUST TO "ONE OR MORE INDIVIDUALS OR ENTITIES WITH FINANCIAL NEEDS THAT ARE NOT BEING ADEQUATELY PROVIDED FOR OTHERWISE," AT ANY TIME, WITHOUT REGARD TO ANY CHARITABLE OBJECT, CONSTITUTES A VALID CHARITABLE TRUST UNDER THE STATUTE OF CHARITABLE USES, 43 ELIZ. c.4, 1601, AS INCORPORATED INTO THE LAWS OF THE STATE OF ARKANSAS BY ARK. CODE ANN. § 1-2-119 (1987)	33
Conclusion			55
Appendix			A-1

TABLE OF AUTHORITIES

Cases	Page
Bakos v. Kryder, 260 Ark. 621, 543 S.W.2d 216 (1976)	27, 43, 47, 48
Biscoe v. Thweatt, 74 Ark. 545, 86 S.W. 432 (1905)	43, 46
Booe v. Vinson, 104 Ark. 439, 149 S.W. 524 (1912)	14, 18, 42, 53
Curry v. Guaranty Loan & Trust Co., 212 Ark. 988, 208 S.W.2d 465 (1948)	14, 19, 20, 21 passim
Fairchild v. Edson, 254 N.Y. 199, 48 N.E. 541 (1897)	49, 50
Garrett v. Mendenhall, 209 Ark. 898, 192 S.W.2d 972 (1946)	34, 43
Goetz v. Old National Bank of Martinsburg, 140 W. Va. 422, 84 S.E.2d 759 (1954)	50
Kohn v. Pearson, 282 Ark. 418, 670 S.W.2d 795 (1984)	26
McDonald v. Shaw, 81 Ark. 235, 98 S.W. 952 (1906)	14, 38, 43, 45
Russell v. Allen, 107 U.S. 163 (1883)	43, 47
Wheeler v. Smith, 50 U.S. (9 How.) 55 (1850)	15, 39, 40, 51 passim

TABLE OF AUTHORITIES (CONT'D)

Statutes — Page

Ark. Code Ann. § 1-2-119 (1987). . 33, 34

43 Eliz. c.4, 1601 . . . . . 33, 34

Other

G.G. Bogert & G.T. Bogert, The Law of Trusts and Trustees § 372 (2d rev. ed. 1991) 26, 27

W. Fratcher, The Law of Trusts § 368.1 (4th ed. 1989) 37

5 W. Page, Law of Wills § 41.25 (W. Bowe & D. Parker 3d rev. ed. 1962 & Supp. 1990) . . . 28, 29

Restatement (Second) of Trusts § 398 (1959) 26, 28

A. Scott, The Law of Trusts § 398.1 (1967 & Supp. 1988) . . . 29, 30, 34

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit was filed on April 7, 1992 and is published as Lancaster v. Merchants National Bank, 961 F.2d 713 (8th Cir. 1992). The decision of the United States Court of Appeals for the Eighth Circuit denying petitioner's petition for rehearing and suggestion of rehearing en banc is an unpublished opinion (infra at A-31), filed on June 2, 1992. The district judge presiding over trial of the action entered an amended memorandum opinion (infra at A-3), published as Lancaster v. Merchants National Bank, 752 F. Supp. 886 (W.D. Ark. 1990), and an unpublished order (infra at A-1), against respondent on February 27, 1991, in the United States District Court for the Western District of Arkansas, Fort Smith Division.

JURISDICTION

Petitioners brought the instant diversity action under 28 U.S.C. § 1332, in the United States District Court for the Western District of Arkansas, seeking to have two mirror-image inter vivos trust agreements declared null and void for lack of any defined charitable object. The action was tried before the Honorable Morris S. Arnold, United States District Judge for the Western District of Arkansas, Fort Smith division.

On February 27, 1991, Judge Arnold entered his order and his amended memorandum opinion, to be filed nunc pro tunc to December 20, 1990, holding that the trusts in question were void for their failure to specify any valid charitable object (A-1; A-3).

Respondent appealed this judgment to the United States Court of Appeals for the Eighth Circuit.

On April 7, 1992, a three-judge panel of the United States Court of Appeals for the Eighth Circuit, John R. Gibson, Circuit Judge, dissenting, reversed the decision of the district court, and held that the inter vivos trusts in question were valid charitable trusts under Arkansas law.

Petitioners timely filed their petition for rehearing and suggestion of rehearing en banc with the United States Court of Appeals for the Eighth Circuit. On June 2, 1992, the United States Court of Appeals for the Eighth Circuit denied petitioners' petition for rehearing and denied petitioners' suggestion for rehearing en banc. Circuit Judge John R. Gibson and Circuit Judge Beam would have

granted the suggestion for rehearing en banc. Chief Judge Arnold took no part in the consideration or decision of the case.

The jurisdiction of the Court to review the judgment of the United States Court of Appeals for the Eighth Circuit is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Petitioners brought the instant diversity action for a declaration that two purported inter vivos trusts did not constitute valid charitable trusts under Arkansas law.

Ark. Code Ann. § 1-2-119 (1987) provides as follows:

> The common law of England, so far as it is applicable and of a general nature, and all statutes of the British Parliament in aid of or to supply the defects of the common law made

> prior to March 24, 1606, which are applicable to our own form of government, of a general nature and not local to that kingdom, and not inconsistent with the Constitution and laws of the United States or the Constitution and laws of this state, shall be the rule of decision in this state unless altered or repealed by the General Assembly of this state.

The Statute of Charitable Uses, 43 Eliz. c.4, 1601, provides in pertinent part as follows:

CAP. IV.

An act to redress the mis-employment of lands, goods and stocks of money heretofore given to certain charitable uses.

Whereas lands, tenements, rents, annuities, profits, hereditaments, goods, chattels, money and stocks of money have been heretofore given, limited, appointed and assigned, as well by the Queen's most excellent majesty, and her most noble progenitors, as by sundry other well-disposed persons; some for relief of aged, impotent and poor people, some for maintenance of sick and maimed soldiers and mariners, schools of learning, free schools, and scholars in universities, some for repair of bridges, ports, havens, causeways, churches, sea-banks and highways, some for education and pre-

ferment of orphans, some for or towards relief, stock or maintenance for houses of correction, some for marriages of poor maids, some for supportation, aid and help of young tradesmen, handicraftsmen and persons decayed, and others for relief or redemption of prisoners or captives, and for aid or ease of any poor inhabitants concerning payments of fifteens, setting out of soldiers and other taxes; which lands, tenements, rents, annuities, profits, hereditaments, goods, chattels, money and stocks of money, nevertheless have not been employed according to the charitable intent of the givers and founders thereof, by reason of frauds, breaches of trust, and negligence in those that should pay, deliver and employ the same: (2) for redress and remedy whereof, be it enacted by authority of this present parliament, That it shall and may be lawful to and for the lord chancellor or keeper of the great seal of England for the time being, and for the chancellor of the duchy of Lancaster for the time being for lands within the county palatine of Lancaster, from time to time to award commissions under the great seal of England, or the seal of the county palatine, as the case shall require, into all or any part or parts of this realm respectively, according to their several jurisdictions as aforesaid, to the bishop of every several diocese and his chancellor, (in case there shall be any bishop of the diocese, at the time of awarding of the same commissions) and to other persons of good and sound behaviour, (3) authorizing them thereby, or any four or more of them, to enquire, as well by the oaths of twelve lawful men or more of the county, as by all other good

and lawful ways and means, of all and singular such gifts, limitations, assignments and appointments aforesaid, and of the abuses, breaches of trusts, negligences, mis-employments, not imploying, concealing, defrauding, mis-converting or misgovernment of any lands, tenements, rents, annuities, profits, hereditaments, goods, chattels, money or stocks of money, heretofore given, limited, appointed or assigned, or which hereafter shall be given, limited, appointed or assigned, to or for any the charitable and godly uses before rehearsed[.]

STATEMENT OF THE CASE

Chester and Grace Kingsbury, husband and wife and residents of the State of Arkansas, executed two mirror-image inter vivos trust agreements on February 19, 1988 (Appellate Decision at 1, A-18). Each settlor named Merchants National Bank to serve as the trustee of the trusts following the death of Chester Kingsbury, and established a board of directors to administer the trusts (Id.). The trusts were funded at their inception, and, in addition, pour-over provi-

sions in the wills of both Chester Kingsbury and Grace Kingsbury bequeathed all of the assets of the respective estates, after payment of taxes and expenses, to Merchants National Bank as trustee of the respective trusts (Id.). Both Chester and Grace Kingsbury died in 1989, citizens and residents of the State of Arkansas, and their respective wills were admitted to probate in Arkansas that same year (Id.).

The dispositive portions of the two mirror-image Kingsbury trusts each authorized the board of directors of the trusts to distribute any or all of the corpus of each trust, at any time to "one or more individuals or entities with financial needs that are not being adequately provided for otherwise," to be selected by the board of directors, without any further restrictions whatsoever

regarding distribution of trust principal (Appellate Decision at 2-3, A-19-20).

Petitioners herein, Frances Lancaster and Larry Lancaster, niece and nephew of Chester and Grace Kingsbury, commenced the instant action in the United States District Court for the Western District of Arkansas, on August 31, 1990. Petitioners sought a declaratory judgment decreeing that the Kingsbury trusts were invalid as charitable trusts for their failure to enunciate a charitable purpose, and were, accordingly, void as a violation of the Rule Against Perpetuities.

Ten days after the petitioners herein commenced the instant action, the respondent herein, Merchants National Bank, as trustee of the trusts in question, commenced an action in the chancery court

of Sebastian County, Arkansas, seeking reformation of the Kingsbury trusts to restrict distribution of the corpus of the trusts to charitable entities only (Appellate Decision at 3, A-20). By seeking such reformation, Merchants National Bank specifically recognized the infirmities of the trusts in their failure to name valid charitable objects.

The United States District Court for the Western District of Arkansas proceeded, with the consent of the parties to the action, to decide the merits of the case on the pleadings and applicable Arkansas law (Id.).

In its amended memorandum opinion, filed February 27, 1991, and dated, nunc pro tunc December 20, 1990, the district court held that the Kingsbury trusts did not constitute valid charitable trusts, inasmuch as "the trustees are specifical-

ly authorized to distribute the entire principal to any person at any time, without regard to any object that could even remotely be described as charitable" (Dist. Ct. Op. at 6, A-13).

Because the trusts failed as charitable trusts, the district court held that the trusts violated the Rule Against Perpetuities and were void, and decreed that the trustees of the trusts held the corpus of the trusts as resulting trusts for the personal representatives of the estates of Chester and Grace Kingsbury, for administration along with the other assets of those estates (Id.).

By a two-to-one majority, a three-judge panel of the United States Court of Appeals for the Eighth Circuit reversed the decision of the district court, holding that the Kingsbury trusts constituted valid charitable trusts for the relief of

poverty, under Arkansas law. Circuit Judge John R. Gibson, dissenting, would have affirmed the decision of the district court, based on the reasoning of the district court in its amended memorandum opinion (Appellate Decision at 7, A-30).

The appellate court denied petitioners' petition for rehearing and denied the petitioners' suggestion for rehearing en banc. Circuit Judge Beam and Circuit Judge John R. Gibson would have granted petitioners' suggestion for rehearing en banc (A-31).

The decision of the circuit court of appeals denying petitioners' petition for rehearing and suggestion of rehearing en banc was entered on June 2, 1992. This petition followed.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE FEDERAL APPELLATE COURT BELOW PRESENTS A PLAIN CONFLICT WITH THE PRIOR DECISIONS OF THE ARKANSAS SUPREME COURT IN HOLDING THAT A TRUST, WHICH SPECIFICALLY AUTHORIZES THE TRUSTEES TO DISTRIBUTE THE ENTIRE PRINCIPAL OF THE TRUST TO "ONE OR MORE INDIVIDUALS OR ENTITIES WITH FINANCIAL NEEDS THAT ARE NOT BEING ADEQUATELY PROVIDED FOR OTHERWISE," AT ANY TIME, WITHOUT REGARD TO ANY CHARITABLE OBJECT, CONSTITUTES A VALID CHARITABLE TRUST UNDER ARKANSAS LAW

a. Summary

Arkansas jurisprudence has long adhered to the traditional Anglo-American rule that in order for a trust to qualify as a charitable trust not subject to the Rule Against Perpetuities, the trust in question must be established for charitable purposes, such as the relief of poverty, the advancement of education or religion, the promotion of health, the advancement of governmental or municipal

purposes, or other purposes which benefit the community as a whole. See, e.g., McDonald v. Shaw, 81 Ark. 235, 98 S.W. 952, 955 (1906).

In this regard, the Arkansas Supreme Court has not hesitated to rule that a purported charitable trust is void ab initio, where the provisions of the purported charitable trust are too vague, indefinite, and uncertain to constitute a trust with a valid charitable objective or objectives which may be subject to judicial administration. See Booe v. Vinson, 104 Ark. 439, 149 S.W. 524 (1912). Moreover, the Arkansas Supreme Court has specifically recognized that a trust may not qualify as a charitable trust unless the terms of the trust preclude distribution of trust assets to profit-making institutions. See Curry v. Guaranty Loan & Trust Co., 212 Ark. 988,

208 S.W.2d 465 (1948).

The foregoing Arkansas appellate authority is fully consistent with the venerable decision of this Court in Wheeler v. Smith, 50 U.S. (9 How.) 55 (1850), wherein this Court recognized that although charitable trusts are favored by the law, nevertheless a trust whose terms permit the corpus thereof to be distributed among objects both charitable and noncharitable must fail as a charitable trust. (For further discussion of Wheeler v. Smith, supra, see argument section II, infra).

Petitioners herein would respectfully submit that the decision of the United States Court of Appeals for the Eighth Circuit in this case runs absolutely contrary to both the letter and the spirit of Arkansas trust law, as enunciated in the above-cited decisions of the Arkansas

Supreme Court. The Eighth Circuit decision has held that the trusts at issue in this case constitute valid charitable trusts, notwithstanding the fact that, under the specific terms of these trusts, the trustees are not limited in disbursing the trust corpus to charitable objects, but are specifically authorized to disburse any or all of the trust corpus to any individuals or entities, profit-making or otherwise, whose only qualification must be unmet financial needs. Under Arkansas trust law, such a broad and ill-defined class of beneficiaries is too vague and indefinite to constitute a valid charitable object. Rather, the objects of the trust in question, under Arkansas authority, may be both charitable and noncharitable, thus rendering the trusts in question invalid per se as charitable trusts.

Petitioners would respectfully submit that if the decision of the Eighth Circuit in the present case is permitted to stand, the decision will create an unacceptable rift in state/federal comity. Such rift will permit certain Arkansas trusts, which could not possibly qualify as charitable trusts in any Arkansas state court action, to nevertheless qualify as charitable trusts so long as the suitors in such an action have the issue decided by an Arkansas federal district court, bound by the erroneous decision of the Eighth Circuit Court of Appeals in this case.

Arkansas appellate authority clearly recognizes the infirmity of the purported charitable trusts in this case. In ignoring Arkansas authority on this issue in this case, the federal appellate court has committed plain error in its depar-

ture from the Erie Doctrine, which should be corrected by this Court in its supervisory capacity, so as to insure that no fissure develops between the Arkansas state court system and the federal appellate system with respect to an issue which is indisputably controlled by Arkansas law.

b. Discussion of Arkansas Authority

In Booe v. Vinson, supra, the Arkansas Supreme Court held a purported charitable trust absolutely void for the indefiniteness of the charitable objectives of the trust. In that case, the testator bequeathed certain property in trust to a trustee to be appointed by the executor of the testator's estate. Trust income was to be paid to an aunt and cousin of the testator during their respective lives, with the remainder to be

distributed by the trustee to "be used for charitable purposes." 149 S.W. at 526. The Arkansas Supreme Court, applying Arkansas law, ruled the purported charitable trust void for indefiniteness of purpose, as follows:

> The devise and bequest to charity leaves the remainder of the estate in general terms to "be used for charitable purposes," without fixing upon any special object, or indicating any plan or scheme for carrying out the purpose, or prescribing any method, or leaving it to the discretion of any one to be appointed to select the beneficiaries, and it is so generally vague, indefinite, and uncertain as not to admit of judicial administration and is void and must fail. Ingraham v. Southerland, 89 Ark. 596, 117 S.W. 748; Hadley v. Forsee, 203 Mo. 418, 101 S. W. 59, 14 L. R. A. (N. S.) 49, and authorities in division 7 of note.

Id. (emphasis added).

In another charitable trust case, Curry v. Guaranty Loan & Trust Co., supra, the Arkansas Supreme Court

recognized that, not only must a valid charitable trust enunciate a charitable purpose or purposes with some degree of specificity, but also that a valid charitable trust cannot provide for purposes which include but are not limited to charity. Rather, a valid charitable trust must, either expressly or by necessary implication, preclude distribution of trust corpus or income to profit-making institutions.

In Curry, the trust at issue provided that the trustees of the trust were to apply the income and corpus of the trust to "some foundation, or organization whose purpose it is to discover a cure for rheumatism; provided that if such trustees cannot agree upon a foundation or organization engaged in such investigation, they may give and donate such proceeds to any charitable institu-

tion." 208 S.W.2d at 466. In Curry, the trust was challenged on the grounds that the trust purposes might include charitable purposes, but were not limited to charitable purposes, as the trustees might apply trust property for the benefit of any organization whose purpose was to discover a cure for rheumatism, regardless of whether or not such an organization was a profit-making institution, and that, accordingly, the trust was not a charitable trust, and it failed for indefiniteness of beneficiaries and as violative of the Rule Against Perpetuities.

The Arkansas Supreme Court "conced[ed] the correctness of appellant's position as to the necessity of exclusion of profit making institutions." Id. (emphasis added). However, the court held that, in that case, because the testator

had provided that if the trustees could not agree on a primary beneficiary, then they were authorized to apply the trust property for the benefit of any charitable institution, a reading of the entire clause at issue clearly indicated that the trustees' discretion was limited to charitable institutions.

Petitioners herein would respectfully submit that, under the terms of the trusts at issue in this case, the trustees' discretion in distribution of trust corpus is clearly not limited to charitable purposes, but that the trustees, under the terms of the trusts, may distribute the trust corpus to virtually any individual or entity. Under the Arkansas authorities cited hereinabove, the trusts are therefore clearly not valid charitable trusts, but are void as a violation of the Rule Against Perpetuities and void

for indefiniteness, under settled Arkansas authority.

Notwithstanding the clear Arkansas authority on this issue, the United States Court of Appeals for the Eighth Circuit in the instant case held that the trusts in question were valid charitable trusts for the relief of poverty. However, the sole restriction on corpus distribution in these trusts merely limits the trustees to distributing trust corpus to "individuals or entities with financial needs that are not being adequately provided for otherwise" (Appellate Decision at 2-3, A-19-20). Clearly such a broad and vague limitation cannot constitute a charitable trust whose purposes are limited to the relief of poverty, inasmuch as innumerable individuals and entities have financial needs that are not being adequately provided for, yet clear-

ly could not be characterized as impoverished, under even the most liberal construction of the term "poverty." This fact was recognized by the district court below, in its holding that the trusts at issue authorize the trustees to distribute the entire principal of the trusts to any person at any time, without regard to any object that could even remotely be described as charitable (Dist. Ct. Op. at 6, A-13).

c. Discussion of Other Authority Regarding Charitable Trusts

The petitioners would respectfully submit that no Arkansas appellate decision has ever upheld the validity of a trust as a charitable trust where the trust instrument authorizes trustees to apply trust assets for both charitable and noncharitable purposes. Moreover, petitioners would respectfully show unto

the Court that numerous respected authorities on the law of charitable trusts are, consistent with Arkansas law, completely at odds with the decision of the federal appellate court in this case. The terms of the trusts at issue in the instant case arguably make provision for charitable purposes in part, inasmuch as they require that any distribution of trust income be made only to individuals or entities which qualify as charitable organizations under the Internal Revenue Code. However, having thus limited income distributions, the trusts go on to specifically provide that the trustees may, at any time, distribute any or all of the trust corpus to any individual or entity, regardless of whether such individual or entity qualifies as a charitable organization under the Internal Revenue Code. Such trusts are commonly

referred to as "mixed trusts," and are recognized by numerous authorities on the subject as being entirely void as charitable trusts, inasmuch as the trust provisions do not limit distribution of trust assets for charitable purposes, but are broad enough to permit distribution of trust assets to both charitable and noncharitable purposes. See Restatement (Second) of Trusts § 398 at 289 (1959); G.G. Bogert & G.T. Bogert, The Law of Trusts and Trustees § 372 at 107 (2d rev. ed. 1991). These authorities provide further support for the proposition that the trusts in question in the present case do not constitute valid charitable trusts under Arkansas law, inasmuch as Arkansas appellate courts have consistently relied on these authorities for definitive guidance in the area of trust law. See, e.g., Kohn v. Pearson, 282

Ark. 418, 670 S.W.2d 795 (1984) (citing Bogert); Bakos v. Kryder, 260 Ark. 621, 543 S.W.2d 216 (1976) (citing Restatement).

The authorities in this regard are as follows:

> The most common type of mixed trust is that where a clearly charitable purpose is stated but the trustee is also directed or permitted to apply trust funds for the benefit of noncharitable causes, for example, where the gift is to trustees to aid the poor and for such purposes of liberality as the trustees approve, or to distribute to such charitable or benevolent objectives as are selected by the trustees. As elsewhere shown, liberality or generosity is not equivalent to charitable, and in some cases benevolence has been held noncharitable. It is usually held in cases of this type, where there is no basis for dividing the fund and none of the exceptions noted below is applied, that the entire trust is void because of indefiniteness of beneficiaries and because of the perpetual or indefinite duration of the trust.

G.G. Bogert & G.T. Bogert, supra, § 372

at 107 (emphasis added; footnotes omitted).

> § 398 Charitable and Invalid Purposes
>
> (1) Where by the terms of the trust the trustee is directed to apply the trust property to purposes which are not limited to charitable purposes but include non-charitable purposes for which a trust or power cannot validly be created, the intended trust fails altogether, except as stated in Subsections (2), (3) and (4).

Restatement (Second) of Trusts § 398 at 289 (emphasis added).

Other well-respected authorities on the law of trusts and trustees are in complete accord with the foregoing authorities, and clearly indicate that the trusts in question in this case are not valid charitable trusts, inasmuch as they authorize the trustees to distribute trust assets for both charitable and non-charitable purposes. See 5 W. Page, Law of Wills § 41.25 (W. Bowe & D. Parker 3d

rev. ed. 1962 & Supp. 1990); A. Scott, The Law of Trusts § 398.1 at 3060 (1967 & Supp. 1988). Specifically, these authorities recognize that mixed trusts such as the trusts at issue in the present case are invalid as charitable trusts, as follows:

> Where the general outlines of the charity are indicated and trustees selected, with discretionary powers for selecting the beneficiaries, such a devise is held in some states to be void for indefiniteness, but in the greater number of states a more liberal rule is adopted, and where the general purpose of the charity is indicated, discretionary powers in the trustees for the selection of the beneficiaries do not vitiate the trust.
>
> * * *
>
> [However,] [t]he discretion of the trustees must, in any event, be limited to a distribution for charitable purposes. If, in his [the trustee's] discretion, it may include noncharitable purposes, the gift is not charitable.

5 W. Page, supra, § 41.25 at 223-28

(footnotes omitted).

> As we have seen, it is very generally held that a trust for purposes which are not limited to charity, although they may be broad enough to include charity, fails altogether. The intended trust cannot be enforced, since there is no beneficiary to enforce it, and the Attorney General cannot enforce it because it is not a charitable trust. It is generally held moreover that not only will the trustee not be compelled to carry out the intended purpose, but he will not be permitted to do so. . . .
>
> Where a testator leaves property for general or indefinite purposes, and does not specifically limit them to charitable purposes, the question in each case is whether he has indicated an intention to confine the disposition of the property to charitable purposes.

A. Scott, supra, § 398.1 at 3060-61.

The majority of the appellate panel in the present case held that a trust, whose corpus distribution is left entirely to the discretion of the trustees, constitutes a valid charitable trusts for

the relief of poverty, under Arkansas law.

Petitioners would respectfully submit that no Arkansas appellate decision so holds, nor does any Arkansas appellate decision suggest such a result.

Moreover, petitioners would respectfully submit that the issue in question is of exceptional public importance, inasmuch as the courts are charged with the oversight of charitable trusts, and the result reached by the federal appellate court in this case is directly at odds with Arkansas state law. Should the appellate decision in this case be upheld, in future cases, suitors in the Arkansas state courts may obtain one result in trust cases, whereas suitors in the federal courts may obtain a completely opposite result with respect to the validity of Arkansas trusts, thus hampering

the integrity of the federalist system.

To permit the present trusts to stand as charitable trusts will sanction, in Arkansas federal courts, the de facto ouster of judicial jurisdiction over charitable trusts, by permitting any trust whatsoever to qualify as a charitable trust and putting the trustee's discretion beyond the power of the Arkansas federal courts to circumscribe, notwithstanding the fact that Arkansas state courts would reach diametrically opposite results in construing identical trust instruments. Accordingly, petitioners would respectfully submit that certiorari is appropriate in this case to correct the conflict created by the federal appellate decision below.

II. THE DECISION OF THE FEDERAL APPELLATE COURT BELOW PRESENTS A PLAIN CONFLICT WITH THE PRIOR DECISIONS OF THIS COURT AND THE ARKANSAS SUPREME COURT, IN HOLDING THAT A TRUST WHICH SPECIFICALLY AUTHORIZES THE TRUSTEES TO DISTRIBUTE THE ENTIRE PRINCIPAL OF THE TRUST TO "ONE OR MORE INDIVIDUALS OR ENTITIES WITH FINANCIAL NEEDS THAT ARE NOT BEING ADEQUATELY PROVIDED FOR OTHERWISE," AT ANY TIME, WITHOUT REGARD TO ANY CHARITABLE OBJECT, CONSTITUTES A VALID CHARITABLE TRUST UNDER THE STATUTE OF CHARITABLE USES, 43 ELIZ. c.4, 1601, AS INCORPORATED INTO THE LAWS OF THE STATE OF ARKANSAS BY ARK. CODE ANN. § 1-2-119 (1987)

As noted in § I, supra, by a two-to-one majority, the appellate panel of the United States Court of Appeals for the Eighth Circuit held that the trusts at issue in this case were valid charitable trusts for the relief of poverty, under Arkansas law. However, neither Arkansas case nor statutory law on this subject, nor the English Statute of Charitable Uses, from which Arkansas law on

this issue derives, supports the conclusion of the appellate panel on this issue.

As noted in the majority opinion of the appellate panel, the Arkansas Supreme Court has recognized that the English Statute of Charitable Uses, 43 Eliz., c.4, 1601, has been incorporated by statute into the law of charitable trusts of Arkansas. See Garrett v. Mendenhall, 209 Ark. 898, 192 S.W.2d 972, 974-75 (1946); see also Ark. Code Ann. § 1-2-119 (1987) (statutory law of British Parliament prior to March 24, 1606 adopted as rule of decision in Arkansas).

Professor Scott's authoritative treatise, The Law of Trusts, discusses the significance of the English Statute of Charitable Uses to American jurisprudence, regarding the definition of charitable purposes for which valid charitable

trusts may be created, as follows:

> In 1601, shortly before the death of Queen Elizabeth, Parliament enacted the famous statute known as the Statute of Charitable Uses. . . . The statute . . . provided machinery for the enforcement of charitable trusts. The importance of the statute, however, lies not in the procedure thus authorized, for it appears after a time to have been little employed, but in the provisions of the preamble of the statute, which contains an enumeration of charitable purposes. The preamble states that property given for charitable purposes has frequently been misapplied, and enumerates among the purposes for which property has been given:
>
> > some for relief of aged, impotent and poor people, some for maintenance of sick and maimed soldiers and mariners, schools of learning, free schools, and scholars in universities, some for repair of bridges, ports, havens, causeways, churches, sea-banks and highways, some for education and preferment of orphans, some for or

> towards relief, stock or maintenance for houses of correction, some for marriages of poor maids, some for supportation, aid and help of young tradesmen, handicraftsmen and persons decayed, and others for relief or redemption of prisoners or captives, and for aid or ease of any poor inhabitants concerning payments of fifteens, setting out of soldiers and other taxes.

This enumeration is not and clearly was not intended to be exhaustive. It merely gives typical instances of purposes that are charitable. The courts, both in England and in the United States, have frequently had recourse to the statute as showing the kind of purpose that is charitable. Any purpose is charitable that falls within one of these types, but it may also be charitable although it does not, if the purpose is more or less analogous to one or more of the purposes specified in the statute. Many of the purposes specified have to do with relief of poverty in one way or another. Some of them have to do with the advancement of edu-

> cation. One of them has to do with public works. One of them deals with the promotion of health, although it actually refers only to sick and maimed soldiers and mariners. Some of the purposes combine relief of poverty with educational purposes. It is interesting to note that the only mention of religion is the repair of churches, and yet it soon was held by the courts that the promotion of religion, or at least of what was regarded as the proper religion, is charitable. The tendency of the courts through the centuries that have elapsed since the enactment of the statute has been gradually to enlarge the scope of charitable purposes, with the result that the purposes enumerated in the statute include only a few of those that are now regarded as charitable.

W. Fratcher, The Law of Trusts § 368.1 at 138-39 (4th ed. 1989) (emphasis added; footnotes omitted).

Through application of the definitions contained in the Statute of Charitable Uses, the Arkansas Supreme Court has long recognized that the relief of poverty constitutes a valid charitable

purpose which may be the subject of a valid charitable trust. See, e.g., McDonald v. Shaw, supra. However, no Arkansas appellate decision, and no decision of this Court, or of any other American court of which petitioners are aware, has held that a trust whose sole limitation on distribution of principal is that principal may be distributed at any time to any person or entity with "financial needs that are not being adequately provided for," constitutes a valid charitable trust for the relief of poverty within the Statute of Charitable Uses and the cases construing the same.

In fact, at least one prior decision of this Court, analyzing the validity of a purported charitable trust with reference to the Statute of Charitable Uses, clearly demonstrates that the trusts at issue in this case do not constitute val-

id charitable trusts within the definitions, expressed or implied, of the Statute of Charitable Uses, but rather are void ab initio for indefiniteness, even under the broad definitions of charitable purposes developed through application of the Statute of Charitable Uses. See Wheeler v. Smith, 50 U.S. (9 How.) 55 (1950).

In Wheeler v. Smith, supra, this Court held that a testamentary trust, which provided that the residue of the testator's estate was left in trust to three named trustees, "for such purposes as they consider promise to be most beneficial to the town and trade of Alexandria," was too vague and indefinite to constitute a valid charitable trust. Id. at 76.

In Wheeler v. Smith, supra, the Court discussed the Statute of Charitable

Uses, and noted that numerous cases construing the same had been particularly liberal in their construction of bequests in order to uphold the same as valid charitable trusts. The Court concluded that the Wheeler trust was not subject to the Statute of Charitable Uses, inasmuch as the Wheeler trust was situated in Virginia, which had repealed the Statute of Charitable Uses. However, the Court noted, significantly, that were it faced with the question of whether the trust provisions in question constituted a valid charitable trust under the Statute of Charitable Uses, the Court would hold that even under the liberal approach adopted by the statute, the trust provisions in question were too vague to constitute a valid charitable trust. In this regard, the Court discussed the provisions of the trust in question with

reference to the Statute of Charitable Uses, as follows:

> From the principles laid down in the above cases, it is clear that the devise under consideration cannot be sustained. A trust is vested in the executors, but the beneficiaries of the trust are uncertain, and the mode of applying the bounty is indefinite. It is argued that the testator intended to give to the town of Alexandria, in its corporate capacity, the residuum of his estate. But he did not so express himself. On the contrary, it clearly appears that the executors were made the repositories of his confidence, and the only persons who were authorized to administer the trust. The cestui que trusts were the town and the trade of the town. It would be difficult to express in more indefinite language the beneficiaries of a trust. How can a court of chancery administer this trust. On what ground can it remove the trustees for an abuse of it. The discretion of the trustees may be exercised without limitation, excepting that the fund must be applied for the benefit of the trade and town of Alexandria. And if the application of the fund be, however remotely, connected with the objects of the trust,

> the judgment of the court could not be substituted for the discretion of the trustees. It is doubtful whether so vague a bequest could be sustained under the 43d of Elizabeth [the Statute of Charitable Uses].

Id. at 80 (emphasis added).

The foregoing analysis of the law of charitable trusts under the Statute of Charitable Uses is completely consistent with Arkansas appellate authority on the same subject, as exemplified by the decision of the Arkansas Supreme Court in Booe v. Vinson, supra. The analysis supports the conclusion that the present trusts cannot possibly be construed as valid charitable trusts for the relief of poverty, where the provisions of the trusts are so broad and indefinite as to permit distribution of trust corpus to virtually any person or entity at any time, without any limitation that distributions be directed solely to the re-

lief of poverty.

Although the majority decision by the appellate panel of the Eighth Circuit cites several Arkansas Supreme Court cases in support of the conclusion that the trusts at issue in the present case constitute valid charitable trusts for the relief of poverty, none of the cases cited supports the conclusion reached by the majority of the panel below. See Bakos v. Kryder, supra; Curry v. Guaranty Loan & Trust Co., supra; McDonald v. Shaw, supra; Biscoe v. Thweatt, 74 Ark. 545, 86 S.W. 432 (1905); Garrett v. Mendenhall, supra; Russell v. Allen, 107 U.S. 163 (1883).

In Bakos v. Kryder, supra, the trust in question provided for the payment of $100 to each child who departed the Hot Springs Children's Home. Upon a determination that the children's home was

created for children from impoverished families and unfortunate circumstances, the Arkansas Supreme Court had no trouble determining that the trust for the disbursement of funds for the poor children departing the home constituted a charitable trust for the relief of poverty. By contrast, the trusts in the present case make no provision for the relief of poverty, and no extrinsic evidence indicates in any way that the trusts be so limited.

In Curry v. Guaranty Loan & Trust Co., supra, the purposes of the trust were specifically limited to distribution of trust assets to any charitable institution, and the Arkansas Supreme Court readily recognized that the purposes of the trust were charitable. By contrast, although the trusts at issue in the present case provide that distribution of in-

come from the trusts be limited to charitable organizations, the trusts specifically make no such limitation whatsoever on distribution of principal, but permit principal to be distributed to any person or entity whom the trustees may choose so long as these individuals or entities simply have unmet financial needs--a nearly universal dilemma.

In McDonald v. Shaw, supra, the trust in question provided that one-half of the funds should be applied to educate poor Catholic children and one-half of the funds should be applied to help educate young men for the priesthood. The Arkansas Supreme Court recognized, under the Statute of Charitable Uses, the promotion of education as a valid charitable purpose and upheld the trust in question as a valid charitable trust for education. By contrast, in the present case,

the trusts at issue make no mention of or provision for education whatsoever, nor for any other charitable purpose so recognized by the Statute of Charitable Uses or by Arkansas case law.

In Biscoe v. Thweatt, supra, the trust corpus was given to the vestry of a church to be used for the benefit of the church. The Arkansas Supreme Court recognized that the promotion of religion constituted a valid charitable purpose, and, consistent with the Statute of Charitable Uses, upheld the trust as a valid charitable trust for religious purposes. By contrast, the trusts at issue in this case make no mention of or provision for religion, nor for any other purpose recognized by the Statute of Charitable Uses and/or the Arkansas Supreme Court or legislature as charitable.

Finally, in Russell v. Allen, supra, the trust corpus was given to certain trustees for the purpose of founding an institution for the education of youth in St. Louis County. This Court recognized that the promotion of education constitutes a charitable purpose, consistent with the Statute of Charitable Uses, and upheld the trust in question as a valid charitable trust for education. By contrast, the trusts at issue in this case make no mention of or provision for education, or for any other charitable purpose.

Only one of the cases cited by the majority of the appellate panel of the Eighth Circuit--Bakos v. Kryder, supra--concerned a charitable trust for the relief of poverty; all of the other cases cited by the majority of the panel concerned charitable trusts for the promo-

tion of education, religion, or health. Moreover, in Bakos, the trust instrument specifically provided that the trust assets should be applied to provide $100 to each child departing from the Hot Springs Children's Home, and the uncontroverted evidence in that case established that the home had been established for and in fact housed children from impoverished families. Thus, in the Bakos case, the purposes of the trust were unquestionably established to be for the relief of poverty, inasmuch as the beneficiaries were a specifically circumscribed class of individuals who were indisputably impoverished.

By contrast, the trustees of the present trust are specifically authorized to distribute any or all of the entire trust corpus to any individual or entity whatsoever, regardless of whether the in-

dividual or entity qualifies as a charitable organization under the Internal Revenue Code, and with the only limiting proviso being that recipients must have financial needs that are not being adequately provided for. As noted above, this "limitation" describes a nearly universal human condition, and cannot conceivably be construed to be so circumscribed as to constitute a valid charitable trust for the relief of poverty.

Although the Arkansas Supreme Court has evidently never been confronted with an alleged charitable trust, the terms of which were so broad as to permit distribution of trust assets to virtually any person or entity, the appellate courts of other jurisdictions which have considered the matter have held such trusts to be invalid as charitable trusts. See, e.g., Fairchild v. Edson, 254 N.Y. 199, 48 N.E.

541 (1897); Goetz v. Old National Bank of Martinsburg, 140 W. Va. 422, 84 S.E.2d 759 (1954).

In Fairchild, the trustees of the alleged charitable trust were authorized to distribute trust principal and income to such incorporated religious, benevolent, charitable, and like societies of the City of New York as they might choose in their discretion. The New York Court of Appeals held that the trust was void for indefiniteness, inasmuch as the class of beneficiaries was far too broad to establish a valid charitable purpose.

In Goetz v. Old National Bank of Martinsburg, supra, the trustees of an alleged charitable trust were authorized to apply trust funds for the benefit of charitable, scientific, educational, or fraternal organizations. The West Virginia Supreme Court held that, inasmuch

as the designated class of beneficiaries might include entities that were operated for profit, the trust was invalid as a charitable trust and was invalid as a private trust, due to the indefiniteness of the beneficiaries, and that the trust corpus accordingly reverted to the heirs at law of the settlor.

Contrary to the conclusion of the majority of the appellate panel in this case, all of the foregoing authorities clearly establish that the trusts at issue in this case cannot conceivably constitute valid charitable trusts under Arkansas law, consistent with the Statute of Charitable Uses. The decision of this Court in Wheeler v. Smith, supra, clearly establishes that, although the Statute of Charitable Uses requires that courts construe trusts with great liberality to favor charities, there are limits to the

construction that a court may place upon a purported charitable bequest, even where the court would like to uphold the bequest in question as charitable.

The decision of this Court in Wheeler v. Smith, supra, clearly points out the pitfalls inherent in upholding overly broad bequests as charitable trusts. Where the discretion invested in a trustee is overly broad, the Wheeler Court recognized that the trustee can make distribution of the trust income and/or corpus to virtually anyone, and a court will be powerless to terminate the trustee for breach of fiduciary duty or abuse of trust, for the trustee will simply be able to point to the overly broad language of the trust as justification for the trustee's actions. Thus, the Wheeler Court noted that overly broad trust language can support virtually any

action that a trustee may take. To avoid such a result, both this Court, and the Arkansas Supreme Court (e.g., in Booe v. Vinson, supra), have recognized that overly broad discretionary provisions in trusts cannot, consistent with the Statute of Charitable Uses, be construed as creating valid charitable trusts for charitable purposes, and have not hesitated to declare such trusts void for indefiniteness and as violative of the Rule Against Perpetuities.

By departing from the clearly enunciated principles of charitable trusts, set up by this Court and by the Arkansas Supreme Court, the Eighth Circuit Court of Appeals in this case has created an irreconcilable conflict between the federal district courts situated in the State of Arkansas and the Arkansas state courts, with respect to the construction

and validity of charitable trusts. The results, if not corrected, will create confusion in the federalist framework, encourage forum shopping between state and federal courts in Arkansas, and lead to judgments by federal courts which are entirely inconsistent with Arkansas jurisprudence on points of substantive Arkansas law.

In order to correct this aberration, this Court should properly grant certiorari in this case, and, in the exercise of its supervisory power, vacate the panel decision of the United States Court of Appeals for the Eighth Circuit in this case, and remand this case to that court, with directions that the court enter final judgment declaring the trusts at issue in this case to be null and void under Arkansas law, consistent with the decisions of this Court, the Arkansas

Supreme Court, and the provisions of Arkansas statutory law.

CONCLUSION

For the foregoing reasons, the petitioners, Frances Lancaster and Larry Lancaster, respectfully request that this Court grant this petition and issue a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

Orin Christopher Meyers
Counsel of Record
15 Northwest 44th Street
Post Office Box 1087
Lawton, Oklahoma 73502
(405) 355-0341
Counsel for Petitioner

No.

IN THE SUPREME COURT
OF THE UNITED STATES

October Term 1991

Frances LANCASTER; Larry LANCASTER,

Petitioners,

v.

MERCHANTS NATIONAL BANK
OF FORT SMITH, ARKANSAS

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

APPENDIX

Orin Christopher Meyers
O. Christopher Meyers, Inc.
15 Northwest 44th Street
Post Office Box 1087
Lawton, Oklahoma 73502
(405) 355-0341

Counsel for Petitioner

TABLE OF CONTENTS

		Page
A.	Order of the District Court . .	A-1
B.	Opinion of the District Court	A-3
C.	Judgment of the Appellate Court	A-15
D.	Opinion of the Appellate Court	A-17
E.	Denial of Petition for Rehearing and Suggestion of Rehearing En Banc by Appellate Court . .	A-31

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

FRANCES LANCASTER et al.,

Plaintiffs

vs.

MERCHANTS NATIONAL BANK
OF FORT SMITH, ARKANSAS,

Defendant

Civil No. 90-2172

ORDER

NOW on this twenty-seventh day of February, 1991, comes on for consideration the above-styled cause.

IT APPEARING to the court that the attached amended memorandum opinion should be substituted for the opinion filed originally on December 20, 1990, it is ORDERED that the attached opinion be filed nunc pro tunc to December 20, 1990, and substituted for the opinion originally filed on that date.

It is further ORDERED that the amended opinion be sent by the clerk's office to all counsel of record and that it be made part of the record on appeal of this case.

_____

Hon. Morris S. Arnold
United States District Judge

U.S. District Court
Western Dist. Arkansas
Filed
Feb. 27 1991
Chris R. Johnson, Clerk
By Deputy Clerk

APPENDIX B

U.S. District Court
WESTERN DIST. ARKANSAS
FILED
December 20, 1990
Chris R. Johnson, Clerk
By Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

FRANCES LANCASTER and
LARRY LANCASTER

PLAINTIFFS

v. Civil No. 90-2172

MERCHANTS NATIONAL BANK
OF FORT SMITH, ARKANSAS

DEFENDANT

AMENDED MEMORANDUM OPINION

In February, 1988, Chester Chapin Kingsbury and his wife Grace executed mirror-image inter-vivos trust agreements, and on the same day they executed wills leaving their entire estates to their respective trusts. Chester Kingsbury died in May of 1989 and his wife Grace died the following September; both

wills have been admitted to probate in Sebastian County, Arkansas, Probate Court. Plaintiffs Frances and Larry Lancaster, who invoke this court's diversity jurisdiction, claim to be the sole heirs at law of Mr. and Mrs. Kingsbury. In their complaint they ask the court to find that the trust documents do not establish valid charitable trusts and to declare a constructive trust in their favor.

Plaintiffs filed their action in this court on August 31, 1990. About two weeks later, defendant, trustee of the Kingsburys' inter-vivos trusts, filed an action in the Sebastian County Chancery Court against both the present plaintiffs and the individual directors appointed to administer the Kingsburys' trusts. In that action, defendant asked the Chancery Court to reform the trust instruments to eliminate any language in them which

would allow the directors to distribute funds to entities which are not charitable.

Defendant now moves to dismiss the present action on the grounds that the federal courts have no power to hear probate matters, and it also urges the court to abstain from exercising jurisdiction, even if it has it, because of the pendency of the suit in the Sebastian County Chancery Court. The parties have stipulated that if the court overrules defendant's contentions it may proceed to rule on the merits and go to judgment on the basis of the record already before it.

I.

It is well settled that a federal court has no jurisdiction to probate a will or administer an estate. See Markham v. Allen, 326 U.S. 490, 494 (1946); Sutton v. English, 246 U.S. 199, 205

(1918). But those questions which relate to the "interests of heirs, devisees, or legatees, or trusts affecting such interests, which may be determined without interfering with probate or assuming general administration, are within the jurisdiction of the federal courts where diversity of citizenship exists and the requisite amount is in controversy." Sutton, 246 U.S. at 205. In this case, it appears that jurisdiction is appropriate since a resolution of this matter by this court will not interfere with the County Probate Court's jurisdiction: Plaintiffs do not ask the court to declare any will invalid or to administer any estate; rather, plaintiffs ask the court to declare that the Kingsburys' inter-vivos trust documents do not establish valid charitable trusts.

Defendant also asks the court to abstain from the exercise of such jurisdic-

tion that it finds to exist and allow the Sebastian County Chancery Court to proceed on the claims presented to it. While the Court in Colorado River Water Conservation District v. United States, 424 U.S. 800, 813-14, 818-19 (1976), indicated that the pendency of a claim in a state court is a consideration in deciding whether to proceed in a case, the issues involved in this case were not presented to the Sebastian County Chancery Court until after plaintiffs filed the instant lawsuit. In an action to construe a trust, as between federal and state courts having concurrent jurisdiction over the subject matter, the court first acquiring it has exclusive jurisdiction. See Princess Lida of Thurn und Taxis v. Thompson, 305 U.S. 456, 466 (1939). The court will therefore not abstain.

II.

Defendant has alleged other matters against plaintiffs' complaint in its motion to dismiss. But since these matters are concerned with the ultimate merits of plaintiffs' claim, and since the parties have agreed that the court can proceed to judgment on the basis of the pleadings and other documents already before the court, the court passes to a consideration and resolution of the present dispute.

Paragraph four of the relevant trust instruments provides for payment of income annually "to one or more nonprofit entities selected by majority vote of the Board of Directors which qualify as Charitable Entities for purpose of Federal Tax Code, so that contributions thereto are fully deductible for Federal Income Tax purposes." The same paragraph directs the trustee to pay the corpus of

the trust "to one or more individuals or entities selected by the Board of Directors regardless of whether or not contributions to such individuals or entities are fully deductible for Federal Tax purposes." Paragraph five contains an assertion that "[i]t is the intent of the Grantor that the Board of Directors have the authority to either perpetuate the Trust by retaining, investing and reinvesting the Corpus thereof or to terminate the trust by distributing all of the Corpus thereof over whatever period of time is deemed appropriate by the Board of Directors to selected beneficiaries."

The Supreme Court of Arkansas recognizes the common-law Rule Against Perpetuities and has done so since 1840. See Moody v. Walker, 3 Ark. 147 (1840). This well-known rule of property declares void any future interest which will not neces-

sarily vest within some life in being at the time of its creation plus twenty-one years. See Cotham v. First National Bank, 287 Ark. 167, 697 S.W.2d 101 (1985); Comstock v. Smith, 255 Ark. 564, 501 S.W.2d 617 (1973); see also J. Gray, The Rule Against Perpetuities § 201 (3d ed. 1915). It has to be obvious that the instruments under scrutiny here fail to comply with this rule, for there was no one alive at the time that the future interests under the trusts were created to whom one can point and say with certainty that those interests would vest within twenty-one years after his death. Because the trusts are of potentially perpetual duration, distributees could be chosen long after everyone who was alive when the trusts were created had been dead for twenty-one years, and since the interest of such a beneficiary could not vest any earlier than the moment he or

she is chosen as a beneficiary, if not until the time of actual distribution, the rule against remote vesting is manifestly violated.

Defendant insists, however, that the trusts relevant here are exempt from the Rule Against Perpetuities because they are charitable. The court disagrees. The restriction on gifts of income that they must be made to entities that could qualify the trusts for a tax deduction does not save the income interests, because there are some organizations that are classified as charitable for tax purposes that might well not qualify as such under common-law definitions of charities. For instance, 26 U.S.C. § 170(c)(3) makes tax exempt gifts to "[a] post or organization of war veterans," and the court does not believe that the Supreme Court of Arkansas would recognize as charitable a perpetual trust for the

support, say, of a local V.F.W. or American Legion post. In order to be charitable at common law, a trust must have been established for the relief of poverty, the advancement of education or religion, the promotion of health, or such similar purposes. See Restatement (Second) of Trusts §§ 368-374 (1959). At best, therefore, a trust that limits its contributions to those entities that will qualify it for a tax deduction would be a so-called mixed trust, that is, one that is both an ordinary private one and a charitable one. But this construction is unavailable here, since it would be theoretically possible for the trustees to devote all of the income to objects that would make their gifts tax deductible but nevertheless not charitable in the common-law sense.

The future interests that the relevant trusts create in the corpus are even

more obviously defective. The trustees are specifically authorized to distribute the entire principal to any person at any time, without regard to any object that could even remotely be described as charitable.

Since all the future interests created by these trusts in both income and corpus violate the Rule Against Perpetuities, the trusts cannot stand.

III.

When a trust fails at its inception, the trustees hold the property upon a resulting trust for the settlor or his estate. See Restatement (Second) of Trusts § 411 (1959). The court will therefore order the trustees of the relevant trusts to pay over the corpus to the personal

representative of the decedents for administration along with the other assets of the estates.

February 27, 1991
Date

HON. MORRIS S. ARNOLD
UNITED STATES
DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

Appeal from the United States
District Court for the
Western District of Arkansas

No. 91-1128WAFS

Frances Lancaster; Larry Lancaster,	*
	*
Appellees,	*
	*
vs.	*
	*
Merchants National Bank of Fort Smith, Arkansas,	*
	*
Appellant.	

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is reversed and the cause is remanded to the

district court for proceedings consistent with the opinion of this court.

April 7, 1992

A true copy.

Attest: Michael E. Gans

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

MANDATE ISSUED 6/9/92

U.S. District Court
Western District Arkansas
Filed: June 11, 1992
Chris R. Johnson, Clerk
By: Deputy Clerk

APPENDIX D

United States Court of Appeals
for the Eighth Circuit

Appeal from the United States
District Court for the Western
District of Arkansas.

No. 91-1128

Frances Lancaster; Larry Lancaster,	*
	*
Appellees,	*
	*
v.	*
	*
Merchants National Bank of Fort Smith, Arkansas,	*
	*
Appellant.	*

Submitted: November 11, 1991

Filed: April 7, 1992

Before McMILLIAN, Circuit Judge, BRIGHT, Senior Circuit Judge, and JOHN R. GIBSON, Circuit Judge.

BRIGHT, Senior Circuit Judge.

Merchants National Bank (Merchants) appeals the district court's judgment, which held that Chester and Grace Kingsbury's trusts were not charitable and,

thus, were void because they violated the rule against perpetuities. We reverse.

I. BACKGROUND

The Kingsburys established two mirror image inter vivos trusts on February 19, 1988. They named Merchants to serve as the trustee, following Chester's death, and established a board of directors to administer the trusts. The Kingsburys provided some assets to form the trust corpus. In addition, a pour-over provision in both Kingsbury wills bequeathed all assets of their respective estates, after payment of taxes and expenses, to Merchants as trustee of the trusts. The Kingsburys died in 1989 and their wills were admitted to probate the same year.

The dispositive portions of the two identical trusts are as follows:

Paragraph 4 [distribution provision]:

> The Trustee is directed to pay over and deliver at least 100% of the income from this Trust and any Trust combined therewith annually or more frequently, to one or more nonprofit entities selected by majority vote of the Board of Directors which qualify as Charitable Entities for purposes of Federal Tax Code, so that contributions thereto are fully deductible for Federal Income Tax purposes. The Trustee is also directed to pay over and deliver any additional sums up to and including all of the assets of this Trust to one or more individuals or entities selected by the Board of Directors regardless of whether or not contributions to such individuals or entities are fully deductible for Federal Tax purposes. (emphasis added)

Paragraph 5 [additional restrictions on distribution]:

> The Board of Directors shall meet at least annually, and more frequently as it deems necessary to select one or more individuals or entities with financial needs that are not being adequately provided for otherwise, and shall then, by majority vote, direct the Trustee to expend such sums as are appropriate to assist in meeting those financial needs. The selection of individuals and entities to whom contributions

> will be made by this Trust shall be at the absolute discretion of the Board of Directors except that the income from the Trust shall be distributed only to recipients that qualify under the Federal Tax Code so that contributions thereto are fully deductible for Federal Tax Purposes. The Board of Directors is not required to maintain this Trust in force perpetually and is authorized to distribute any or all of the assets thereof to selected recipients in its discretion. It is the intent of the Grantor that the Board of Directors have the authority to either perpetuate the Trust by retaining, investing and reinvesting the Corpus thereof or to terminate the Trust by distrubuting [sic] all of the Corpus thereof over whatever period of time is deemed appropriate by the Board of Directors to selected beneficiaries. (emphasis added)

Frances Lancaster and Larry Lancaster (the Lancasters), the Kingsburys' niece and nephew-in-law, instituted an action in the district court, on August 31, 1990. The Lancasters sought injunctive relief and a declaration that the Kingsburys' trusts were void for failure

to designate beneficiaries and violation of the rule against perpetuities. Jurisdiction was invoked under 28 U.S.C. § 1332 (1988), based on diversity of citizenship. Ten days after the Lancasters filed their suit, Merchants filed a suit in the Sebastian County Chancery Court seeking a declaration that the Kingsburys' trusts were charitable and that the trusts could only be administered in conformity with that purpose. The suit also sought reformation of the trusts to restrict the distribution of the corpus only to charitable entities eligible to receive tax deductible contributions.

Merchants filed a motion to dismiss, challenging the district court's subject matter jurisdiction and the merits of the Lancasters' allegations. With the parties' consent, the district court proceeded to decide the merits of the case, on the basis of the pleadings, adversely

to Merchants. In an opinion and order, dated December 20, 1990, the district court held that the trusts were void as violative of the rule against perpetuities and ordered that Merchants, as trustee, pay over the corpus of the trusts to the administrator of the Kingsburys' estates.

Merchants filed a Notice of Appeal on January 10, 1991. On February 27, 1991, the district court filed an amended memorandum opinion to correct a clerical error and ordered that the amended opinion be substituted nunc pro tunc for the December 20, 1990 opinion.

II. DISCUSSION

A federal court may properly exercise jurisdiction to settle controversies relating to the validity of a trust, created in part by a testamentary bequest, where diversity of citizenship

exists and the requisite amount is in controversy, so long as the determination does not interfere with probate proceedings or assume general administration. Sutton v. English, 246 U.S. 199, 205 (1918); see also Montgomery v. Blankenship, 230 S.W.2d 51, 56 (Ark. 1950) (state court took jurisdiction over trust to decide that it did not violate rule against perpetuities); Garrett v. Mendenhall, 192 S.W.2d 972, 974 (Ark. 1946) (same).

This court must review de novo a district court's determinations of state law. Slave Regina College v. Russell, 111 S. Ct. 1217, 1221 (1991). Thus, no appellate deference is required in our review of the district court's decision that the Kingsburys' trusts are not charitable under Arkansas law. Id. at 1224.

Charitable bequests and trusts have traditionally been favorites of the law

and courts will struggle to uphold them, whenever possible. Russell v. Allen, 107 U.S. 163, 166-67 (1883). Arkansas courts are willing to construe instruments in a manner consistent with the creator's intent, in order to uphold charitable gifts. In Garrett v. Mendenhall, the court set forth Arkansas' policy regarding such gifts:

> By the law of England from before the statue [sic] of 43 Eliz., c. 4, and by the law of this country at the present day (except in those States in which it has been restricted by statute or judicial decision . . .), trusts for public charitable purposes are applied under circumstances under which private trusts would fail. Being for objects of permanent interest and benefit to the public, they may be perpetual in their duration, and are not within the rule against perpetuities; and the instruments creating them should be construed so as to give them effect, if possible, and to carry out the general intention of the donor, when clearly manifested, even if the particular form and manner pointed out by him cannot be followed.

192 S.W.2d at 974-75 (quoting Russell, 107 U.S. 163, 166-67); see also Bakos v. Kryder, 543 S.W.2d 216, 218-19 (Ark. 1976); Curry v. Guaranty Loan & Trust Co., 208 S.W.2d 465, 466 (Ark. 1948); McDonald v. Shaw, 98 S.W. 952, 953-55 (Ark. 1906).

Arkansas law defines charitable trusts as those "for the promotion of purposes which are of a character sufficiently beneficial to the community to justify permitting property to be devoted forever to their accomplishment. . . ." Bakos, 543 S.W.2d at 219 (quoting Restatement (Second) of Trusts, § 374 (1959)). Relief of poverty qualifies as a charitable purpose. Id.; McDonald, 98 S.W. at 954-55. An Arkansas court has pointed out that, in order to establish a charitable trust, the grantor need only describe the general nature of the charitable trust and may leave the details of

its administration to be settled by the trustees under the supervision of a court of chancery. Curry, 208 S.W.2d at 466 (quoting Russell, 107 U.S. at 167); see also Bakos, 543 S.W.2d at 218-19; Garrett, 192 S.W.2d at 974; McDonald, 98 S.W. at 954-55; Biscoe v. Thweatt, 86 S.W. 432, 433 (Ark. 1905). The charitable trust must be sufficiently definite as to designate a general class of beneficiaries of the charitable trust, but may leave the trustees with the duty and power to select, at their discretion, the specific beneficiaries. Id.

The Kingsburys' trusts, in paragraph 5, provide that the Board of Directors shall "select one or more individuals or entities with financial needs that are not being adequately provided for otherwise . . ." and direct the trustee to provide these beneficiaries with "such sums as are appropriate to assist in

meeting those financial needs." Paragraphs 4 and 5 further provide that the income from the trusts be payable only to nonprofit entities, which qualify as charitable entities under the Federal Tax Code, so that such contributions will be tax deductible.

The district court determined that the trusts failed to adequately restrict distribution of the trust income and corpus to beneficiaries that qualify as charitable entities under the common law definition of charities, but did not discuss controlling Arkansas law on the subject. Also, the district court failed to consider the dispositive provisions found in paragraph 5 of the trust instruments, which limited the selection of beneficiaries to those with unmet financial needs. The district court expressly recognized, however, that relief of poverty is a valid charitable purpose.

The provisions in paragraphs 4 and 5 of the trust instruments demonstrate the grantors' charitable intent. As a whole, the trust instruments must be interpreted to refer to and to limit their application to the relief of poverty, which qualifies as a charitable purpose under Arkansas law. The grantors have sufficiently indicated the class of individuals from which the Board of Directors and trustee may select individual beneficiaries, so the charitable trusts do not fail for indefiniteness.

Thus, in accordance with the grantors' intent and governing Arkansas law, the trusts are charitable. The trustee may, nevertheless, proceed with its action in Sebastian County Chancery Court seeking reformation of the trust instruments to more precisely reflect the charitable objects of the grantors' bounty.

Kohn v. Pearson, 670 S.W.2d 795, 796-97 (Ark. 1984); Curry, 208 S.W.2d at 466.

A charitable trust constitutes an exception to the rule against perpetuities and cannot be invalidated for a violation of that rule. Russell, 107 U.S. at 167; Bakos, 543 S.W.2d at 219; Garrett, 192 S.W.2d at 974; Biscoe, 86 S.W. at 433; Restatement (Second) of Trusts § 365 (1959). The Arkansas Supreme Court, in Bakos, held that: "A charitable trust is not invalid although by the terms of the trust it is to continue for an indefinite or an unlimited period." Bakos, 543 S.W.2d at 219 (quoting Restatement (Second) of Trusts § 365). Because we hold that the Kingsburys' trusts are charitable trusts, the trusts may continue in perpetuity and not violate the rule against perpetuities.

III. CONCLUSION

We hold that the Kingsburys' trusts are valid, charitable trusts. Accordingly, we reverse and remand for the entry of an appropriate declaratory judgment consistent with this opinion.

JOHN R. GIBSON, Circuit Judge, dissenting.

I respectfully dissent. I would affirm based on the reasons so well articulated in the district court's amended memorandum opinion.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX E

FILED: June 2, 1992
Michael Gans, Clerk of Court

United States Court of Appeals

for the Eighth Circuit

Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc

No. 91-1128WAFS

Frances Lancaster, Larry Lancaster, *

Appellees, *

vs. *

Merchants National Bank of Fort Smith, Arkansas, *

Appellant.

The suggestion for rehearing en banc is denied. Judge John R. Gibson and Judge Beam would grant the suggestion for rehearing en banc.

The petition for rehearing is also denied.

Chief Judge Arnold took no part in the consideration or decision of this case.

June 2, 1992

Order Entered at the Direction of the Court:

Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit